

Welcome to LG Matters, covering a snapshot of current legal issues affecting Local Government in South Australia, presented to you by the Team at Wallmans Lawyers.

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ORDINARY RETURNS UNDER SCRUTINY

There has always been some uncertainty surrounding the level of detail required from elected members when completing their ordinary returns. The South Australian Police have recently had cause to consider this issue and have reviewed the level of detail provided in some elected member ordinary returns. In one instance, the involvement of SAPOL arose from information provided by a whistleblower.

Accepting that the forms are dated and are in need of a "user friendly" revision, SAPOL has identified additional information that should be included when relying upon Question 13 of the Form 4 Ordinary Return. Question 13 requires a member to "Declare any other *substantial interest of [the member] or of a person related to [the member]...of which [the member] is aware and...might appear to raise a material conflict*



between [the member's] private interest and the public duty...as a member of council". It is important to ensure that relevant information is included in this "catch all" provision relating to anything additional to the other questions that might raise a conflict. This means including additional detail that is not captured elsewhere on the form or may mean elaborating on information that has already been disclosed on the form. For example, an income source may be from a particular company (which is disclosed in Question 1 of Form 4), but that company may be one that the Council, on occasion, contracts with. This means that further information should be provided at Question 13 of the form.

Recommendations by SAPOL include an emphasis on training to assist with the completion of ordinary returns and observance of the conflict of interest provisions. The timing of these recommendations is particularly relevant given the completion of ordinary returns due by 29 August 2010 and primary returns to be completed by new members within 6 weeks after election or appointment following the November 2010 periodic elections.

For further information please contact Natasha Jones, Partner, Local Government, on (08) 8235 3039 or natasha.jones@wallmans.com.au

BYE BYE BY-LAWS! A TIMELY REMINDER REGARDING BY-LAW REVIEW

We are aware that a number of Councils' by-laws are due to expire on 1 January 2011. Given by-law reviews involve a lengthy and complex legislative process, including public consultation and referral to external bodies, we recommend that Councils in this position take immediate steps to progress their by-law review.

To that end, Wallmans Lawyers, in conjunction with the LGA have developed template by-laws to facilitate both a streamlining of the by-law review process and a cost effective approach for Councils. Having been involved with the development of the template By-laws, we are clearly well placed to assist Councils with their by-law review.

The template by-laws are available on the LGA website and include the following:

- By-law No. 1 – Permits and Penalties
- By-law No. 2 – Local Government Land
- By-law No. 3 – Roads
- By-law No. 4 – Moveable Signs
- By-law No. 5 - Dogs
- By-law No. 6 - Cats

The template By-laws can be adapted to address the specific needs of each Council.

For further information please contact Cimon Burke, Solicitor in Local Government on (08) 8235 3084 or cimon.burke@wallmans.com.au or Michael Kelledy, Partner in Local Government on (08) 8235 3091 or michael.kelledy@wallmans.com.au



2010 – YEAR OF FEDERAL INTERVENTION IN CAPITAL CITY PLANNING?

Towards the end of 2009, the Federal Government resolved to develop (through the Council of Australian Governments ("COAG") and in consultation with the States and Territories and the Australian Local Government Association) national criteria for the future strategic planning of our major cities.

Each capital city planning strategy will need to conform to a list of "National Planning Principles" developed by COAG.

It is proposed that the National Planning Principles should focus on:

- the release of land that meets the housing needs of a growing population and keeps homes affordable;
- balancing in-fill and greenfield development;
- reduction of greenhouse gas emissions (through initiatives such as energy efficiency measures, changes to town planning, practical improvements in public transport infrastructure and reform of building codes and regulations);
- climate change such as coastal inundation and more extreme weather events;
- world-class design and architectural integrity; and
- building and upgrading nationally significant infrastructure (such as transport, corridors, intermodal connections and communications and utilities networks).

This year, the COAG Reform Council will begin to independently assess the planning systems of each State and Territory against these principles, with interim reports expected to be delivered in 2011. By 2012, all capital cities will be required to have a long-term planning strategy, based upon the National Planning Principles.

Despite the fact that further details on the legislative scheme to accompany this concept are yet to be announced, it seems that 2010 may be remembered as the start of a new era of cooperation between the Federal, State and Local Governments in the future planning system for the capital cities of Australia. We will be awaiting further updates on legislative reform in this area, and will ensure that the process of reform is reported to you as new developments occur.

For more information, please contact Nicole Harris, Senior Associate, Local Government, on (08) 8235 3017 or nicole.harris@wallmans.com.au or Victoria Shute, Associate, Local Government, on (08) 8235 3078 or victoria.shute@wallmans.com.au



WHO IS YOUR 'RESPONSIBLE OFFICER'?

Every council has a 'responsible officer' (usually the CEO) for the purposes of the *Occupational Health, Safety and Welfare Act* but only some have appointed a 'responsible officer' for the purposes of the *Whistleblowers Protection Act*. Be aware that the *Local Government (Accountability Framework) Amendment Act 2009* has amended the *Local Government Act 1999* to provide a new Section 302B. This Section (which will come into operation on proclamation – being a date within the next two years) provides that each Council MUST ensure that an appropriately qualified staff member is designated as a 'responsible officer' for the purposes of the *Whistleblowers Protection Act*. The issue of 'appropriate' qualifications will be as prescribed by regulations.

We have been providing whistleblower training through the LGA training program for a number of years. We will ensure that these courses meet the requirements of the legislation for responsible officer training once they are known.

In the meantime, please contact Michael Kelledy on (08) 8235 3091 or michael.kelledy@wallmans.com.au for further information.

LIQUOR LICENSING ACT CHANGES – A BRIEF CHEAT SHEET FOR COUNCILS

The recent changes to the *Liquor Licensing Act* will take effect in May this year. The following is a "snapshot" of what selected changes will mean for Councils.

Commissioner's Code of Practice – The Commissioner will soon be empowered to publish a Code of Practice on a wider range of issues than simply the responsible service of liquor. Such may include disturbance related matters, behaviour within licensed premises and public order and safety at events expected to attract large crowds. Councils should keep up to date with the Code to determine if trouble-prone premises are meeting industry standards.

Producer's Licence – will be radically transformed allowing them to offer a greater cellar door experience, collective cellar doors and permanent endorsements to sell liquor at certain public events. Council will still need to ensure all relevant approvals, consents and exemptions (e.g. under the *Local Government Act* or *Development Act*) are in place. For instance, will the changes amount to a change to the premises' current approved use for *Development Act* purposes? Will it breach conditions of the current Development Approval? What impacts on amenity will there be?

Council may object or intervene in Licensing applications and ask for specific licence conditions to deal with increased traffic/car parking needs, appropriateness of trading hours, style of entertainment permitted, presence of security/crowd controllers, responsible service issues, a change in the nature/style of the premises etc.

As for permanent endorsements to sell take-away liquor at events, Councils may be the landlords or organisers of such – for instance, a local fair/farmer's market. Council should consider if permanent liquor



sales are desirable at such events and whether it might cause any potential responsible service issues. Eg. Is there potential conflict with a nearby dry zone? Would a Limited (Liquor) Licence be more suitable?

Intoxication – The changes will introduce a new test for when liquor service must stop, along with more measures for keeping drunk or rowdy patrons out of licensed premises. This could potentially cause increased public noise and disturbance as ejected patrons take their anger onto the streets. Councils might consider devising/reviewing collective approaches dealing with licensed premises (ie. Precinct Licensing Statements, Licensing Policies, Accords or Development Plan amendments that limit trading hours, or locations for certain types of licensed premises).

Should these measures fail to keep the peace, Councils also have the option of issuing a formal complaint under the *Liquor Licensing Act* with the Licensing Authority against the Licensee responsible and may seek to have stricter conditions imposed on a particular Licence or indeed a number of licensees in a certain precinct.

For further advice or assistance please contact Ben Allen, Partner, Hospitality and Development on (08) 8235 3018, or ben.allen@wallmans.com.au or Peter Hoban, Partner, Hospitality and Development on (08) 8235 3001 or peter.hoban@wallmans.com.au

NATIONAL EMPLOYMENT SYSTEM: THE TRANSITION FOR SOUTH AUSTRALIA

The National Employment System is established under the *Commonwealth Fair Work Act and Regulations* and came into operation on 1 January 2010. This system implements a set of national minimum standards for employment called the National Employment Standards (the 'NES') and facilitates the operation of 'Modern Awards', which replace Federal pre-reform awards and ultimately, State awards.

With regard to the transition of South Australian employers and employees into the National Employment System, generally all private sector employers, whether they are incorporated or unincorporated entities, are now subject to the National Employment System, with the exception of Public Sector and Local Government employers and employees, as well as employees earning over the prescribed 'High Income Threshold' (a guaranteed income of \$108,300.00 per annum). State awards continue to apply in respect of employment in the Public Sector and Local Government and that employment remains within the South Australian industrial relations jurisdiction.

Despite the transition of South Australian private sector employers and employees into the National Employment System, all South Australian awards and agreements continue to operate until 31 December 2010, though subject to the NES in the interim. From 1 January 2011, Modern Awards will apply to South Australian private sector employers and employees.

For more information please contact Fiona Tillmann, Senior Associate, Employment and Workplace, on (08) 8235 3002 or fiona.tillmann@wallmans.com.au



WHEN POLITICAL PROTEST BREACHES THE *DEVELOPMENT ACT* *CITY OF ONKAPARINGA V BECKER & INGLIS* [2010] SAERDC 1 (18 JANUARY 2010)

This recent judgment from the ERD Court relates to a very unusual and interesting enforcement matter commenced under section 85 of the *Development Act 1993*.

The Respondents owned a dwelling at Port Noarlunga South. They had placed numerous blackboards and cardboard signs in the front yard of their property and had used chalk and other mediums to write messages upon them. In addition to the signs, the Respondents had also written messages on shade cloth which was affixed to their verandah, and from time to time also made banners from shade cloth, tied them to a tree and displayed messages on them.

The messages themselves changed from time to time and promoted particular causes, the political ambitions of the Respondents or contained political messages, all in language which was described by the Court as "*frank*".

The Council commenced enforcement proceedings under section 85 of the *Act* to obtain orders, for the removal of the boards and banners.

The Court determined that whether the placement of the boards and banners was an act or activity of development, depended upon whether this activity fell within the definition of *detached dwelling*, which was the approved use of the land. The Court examined the limited definition of *detached dwelling* and concluded that the placement of signs and political messages were outside of the definition of *detached dwelling*. Therefore, they required development approval, unless this act or activity was otherwise exempted under the *Development Act 1993* or *Development Regulations 2008*.

Firstly, the Court examined clause 5(1) of Schedule 3 of the *Development Regulations*. The Court determined that although the activity conducted by the Respondents was of a substantial benefit to the Respondents themselves, the dimensions of the boards and banners and the number of them on the land, meant that it could not be said that their placement was reasonably incidental to the residential use of the land.

The Court then examined clause 5(2) of Schedule 3 of the *Regulations*. The Court determined that the number and size of the messages on the boards and the banners had a detrimental impact on the amenity of the locality. Therefore, the activity of the Respondents did not fall within a "*home activity*" as defined and so was not exempt from the definition by clause 5(2) of Schedule 3.

Lastly, the Court turned to the question as to whether the acts and activities undertaken by the Respondents fell within an act or activity declared by regulation to constitute development. The Council submitted to the Court that the acts and activities of the Respondents amounted to the commencement of the display of an advertisement and so was "*development*" by operation of clause 7 of Schedule 2 of the *Development Regulations*. The Court, in agreeing with the Council, found that the definition of "*advertisement*", by including



the terms "sign" and "banner", encompassed the boards and banners containing messages which had been placed by the Respondents on their land.

Accordingly, the Court found that on each occasion that the Respondents commenced a display of a sign or banner (but not when they changed the contents of the sign), they commenced an act or activity of development, which required approval from the Council.

For further information please contact Victoria Shute, Associate, Local Government, on (08) 8235 3078 or victoria.shute@wallmans.com.au

LIQUOR LICENSING ACT CHANGES TO PRODUCER'S LICENCES – WHAT IT MEANS FOR COUNCILS

Recent amendments to the *Liquor Licensing Act* allowing holders of Producer's Licences to apply to radically expand their trading rights and cellar door experience take effect May this year.

Councils should be aware that licensing applications pursuant to these changes could have implications at both a Licensing and Development level. For instance, will the changes sought amount to a change to the current approved use of the premises for *Development Act* purposes? Will it breach conditions of the current Development Approval? What impacts on amenity will there be?

When Councils are also asked to comment on a licensing application, they should check to ensure that all adequate approvals, consents, or exemptions (eg. under *Local Government Act* or *Development Act*) are in place. If any are deficient, Council should object and ask the Commissioner to adjourn the licensing application until such are obtained.

Even if all are in place, approval under one Act does not necessarily mean approval under all. There may be other issues; eg. increased traffic / car parking needs, appropriateness of trading hours, style of entertainment permitted, presence of security/crowd controllers, responsible service issues, a change in the nature/style of the premises etc. Council can ask for specific licence conditions to address these issues by lodging an Objection or Intervention.

As a party to the proceedings, Council should be represented at conciliation conferences and provide reasons why such conditions are desirable. If Council is unsure of any proposed resolution, it could ask for a 6 or 12 month trial period provided all parties agree.

If the parties reach an agreement at conciliation, orders can be made on the day noting the resolution. If the parties cannot reach agreement then the application will proceed to a hearing before the Commissioner (or one of his delegates) or the Licensing Court. Such hearings may occupy 2-3 days of the Authority's time.

For further advice or assistance please contact Ben Allen, Partner, Hospitality and Development on (08) 8235 3018, or ben.allen@wallmans.com.au or Peter Hoban, Partner, Hospitality and Development on (08) 8235 3001 or peter.hoban@wallmans.com.au



Don't miss our 'Local Government Liquor Licensing – The Changing Climate' Seminar which will cover the amendments to the Act which are to take effect from May 2010 as well Council's role in regards to Licensing matters. This seminar will build upon our popular 2009 seminars. **For more information, or to register, please see the Seminar information listed at the end of this publication.**

HEAVY DUTY WORK – POTENTIAL LIABILITIES OF CONSTRUCTION MANAGERS

In recent months, the Local Government Property & Construction team at Wallmans has been asked to give advice on some major SA projects.

It is important to know where responsibility lies between Councils and Project/Construction Managers appointed by contractors. What is Council entitled to expect from Construction Managers? How can Councils ensure that Council contracted works are managed properly?

Aside from responsibilities specifically outlined in the Construction Management Agreement (or Consultancy Agreement), a Construction Manager owes a general duty to the Council to perform contracted obligations in a professional, expert and competent manner. Agreements should contain clearly defined terms so that there is no ambiguity as to what is expected of the Manager and the Council respectively. Where a Construction Manager fails to diligently carry out their duties (which would include appointing sub-contractors, reporting, and coordinating on-site activities) Council would likely have a claim against the contractor for losses sustained by the Council caused by such failure, and potentially, a claim for contribution and/or indemnity for any third party claims against the Council.

The 2005 UK case of *Great Eastern Hotel Company Ltd v John Laing Construction Limited* provides an example.

Laing was engaged by the Hotel as Construction Manager for refurbishment of a city centre hotel in London. The project vastly overran in terms of time and consequently cost the Hotel an alleged additional £17 million in surplus wages for the professional team, lost profit and other damages.

The Hotel argued that Laing had misconducted itself by failing to perform its contractual obligations in relation to planning and programming the works in a competent manner which resulted in a significant delay of approximately 44 weeks. Laing refuted responsibility for the overrun and blamed it, instead, on the building sub-contractors. It sought to distinguish the relationship created under the Construction Management Contract from one with the traditional main contractor, where the contractor enters into the subcontracts and therefore, assumes any risks under the Contract including the risk of sub-contractor set-backs.

The court considered Laing's intentional misreporting of delays and failures to provide to its client sufficient information on the progress of the project *as contrary to the reasonable skill, care and diligence which should have been exercised by a properly qualified, professional Construction Manager carrying out the project*. The court reasoned that the fact that Laing conveyed incomplete information to the Hotel directly caused it to expend extra monies in an attempt to hasten the works. Further, the programme compiled by Laing had been fundamentally flawed and unachievable. The court concluded that Laing had breached its professional duty towards the Hotel by failing to give objective advice based on all known facts. Had the Construction Manager accurately and sincerely performed his reporting duties, the project could have been completed in accordance



with actual progress. Even though there were other factors that had prolonged the works, Laing was found liable for the entire cost of the delays - £10 million in damages.

While this was a UK decision, the principles have general application to all Australian building contracts, and the case does provide an indication of the type of duties which could be imposed on a Construction Manager.

Council contract managers should be aware of the scope of duty of Construction Managers engaged by the Council, and bear in mind that a Construction Manager is employed for the purpose of bringing key skills to a construction project. Where failure to reasonably exercise such skill directly compromises the efficient delivery of that project, the manager could be held liable for breach of this professional duty.

Councils need to ensure that where they are using such consultants, the Agreements regulating the relationship sufficiently covers the Council's interests.

For more information please contact Trevor Gormley, Senior Associate, Local Government on (08) 8235 3010 or trevor.gormley@wallmans.com.au or Mark Sallis, Special Counsel, Commercial and Property, on (08) 8235 3006 or mark.sallis@wallmans.com.au

WALLMANS LAWYERS AND THE AUSTRALIAN LOCAL GOVERNMENT WOMEN'S ASSOCIATION KICK OFF YEAR OF WOMEN IN LOCAL GOVERNMENT



On the 1st March, Wallmans Lawyers partnered with The Australian Local Government Women's Association (SA Branch) to launch *Climbing Your Ladder to Success series*, an initiative to celebrate and promote the Year of Women in Local Government. The Year of Women celebrates and encourages the advancement of women working and elected to Local Government and to promote women to senior management and leadership roles.

The launch, hosted by Wallmans, saw over 80 elected members and Local Government staff congregate to network and discuss the continual promotion and participation of women in the sector. In Local Government nationally, women account for only 30 per cent of Councillors, 20 per cent of Senior Management, and just 5 per cent of CEOs. Over the next decade, as the elected/employed baby boomers retire, it will be critical that younger women view Local Government as an attractive opportunity for employment, or, to participate in their community as an elected member.

Guest speaker Barbara Pocock, Director for the Centre of Work + Life, University of South Australia gave an insightful presentation on 'Women in Local Government- Making a Contribution and Staying Sane.' Wendy Campana, Executive Director of the Local Government Association of South Australia also spoke on the status of women in local government and future initiatives to ensure the greater participation of women in senior roles.

The *Climbing Your Ladder to Success* series will include 6 'Step Up' sessions held at metropolitan and country council venues. Each session features presentations from elected and staff members and either a 2010 Women's Ambassador for Local Government or a female emerging leader (Local Government



Managers Australia -SA Division). The series are not only targeted to women working or elected in Local Government, but also for those women interested in joining the Local Government workforce, or as a candidate in the November 2010 elections. The sessions will lead up to a final half-day session on the 27th August, 'The Top Rung' which will present outcomes from the series and ways to move forward.

Step up Sessions

| | |
|---------------|--------------------------------------|
| 9 April 2010 | City of Salisbury |
| 23 April 2010 | City of Onkaparinga |
| 14 May 2010 | City of Mount Gambier |
| 28 May 2010 | District Council of the Copper Coast |
| 11 June 2010 | City of Campbelltown |
| 25 June 2010 | City of Charles Sturt |

'The Top Rung'

| | |
|----------------|---------------|
| 27 August 2010 | City of Unley |
|----------------|---------------|

For more information on the program, or to register for any of the sessions, please visit:

<https://sites.google.com/site/algwasa/2010-year-of-women-in-local-government-1/south-australia-2010-year-women-in-local-government>

UPCOMING SEMINARS- Register Now

Don't miss the following seminars covering topical issues in Local Government.

□ *Seeing the Wood for the Trees: Current Issues in Tree Management and Retention*

The management and retention of trees raises many issues, including environmental issues, issues with respect to private property rights (where trees are located on private land) and neighbourhood characteristic issues. It is fundamentally important, therefore, to understand the current and proposed framework governing tree management and retention.

For the complete seminar flier, including registration form please visit:

<http://www.wallmans.com.au/TreeSeminar2010.pdf>

Dates:

15th April, 12-2pm (FULL) or:

29th April 2010, 12-2pm (*limited places available*)



□ *Investigation and Enforcement: It's Elementary My Dear Watson!*

In recent times, the former acting Ombudsman was critical of the enforcement procedures undertaken by Councils and has identified a number of failings in this area. Further, Parliament has recently introduced the *Local Government (Accountability Framework) Act 2009*, which amends the *Local Government Act 1999* in order to increase accountability in Local Government. It's time to raise the bar!

This seminar will provide Council Officers who are responsible for conducting investigations and undertaking enforcement procedures (including General Inspectors, Animal Management Officers, Public and Environmental Health Officers, Development/Building Compliance Officers) with the knowledge required to ensure their enforcement actions are not compromised by procedural and/or evidentiary shortfalls. The seminar will raise awareness of the relative strengths and weaknesses of evidence gathering and enforcement procedures and will provide guidance in overcoming the obstacles that commonly arise. The program will have an interactive component during which participants will be challenged by practical workshop problems to assist them in applying the principles outlined.

For the complete seminar flier, including registration form please visit:
<http://www.wallmans.com.au/EnforceSeminar2010.pdf>

Dates:

Thursday 20th May, 2pm-5.30pm

or:

Thursday 27th May, 2pm-5.30pm

□ *Local Government: Liquor Licensing – The Changing Climate*

This seminar builds on the 3 very successful seminars which Wallmans Lawyers conducted last year. This is an update for those Council staff who are required to deal with Applications of various kinds made under the *Liquor Licensing Act*. The seminar will cover the impending amendments to the *Liquor Licensing Act* which are to take effect from May this year.

This update will provide participants with an understanding of the following:

- Amendments to the Liquor Licensing Act which are to take effect from the 3rd of May 2010.
- What do I need to do when I receive Notice of an Application made under the Act?
- What approvals, consents or exemptions am I required to be satisfied are in place?
- Do I have delegated authority?
- When should I intervene, object to an Application or just do nothing?



- What can Council expect to achieve out of the Conciliation process?
- Does Council still have a role to play once development approval has been granted?
- Do trial periods work?
- Council's role in relation to Limited Licences (1 off special events)?
- How do I control outdoor dining permits?
- Can Council take disciplinary action under the Liquor Licensing Act?
- Does Council have a role in noise/disturbance complaints in relation to licensed premises?
- Dry Zones.
- Food and Wine Festivals.

For the complete seminar flier, including registration form, please visit:
http://www.wallmans.com.au/2010_Update/LiquorLicensingSeminar.pdf

Date:

Thursday 13th May, 2-4.30pm (incorporating a tea break).

□ Wills...Why Not (FREE SEMINAR)

Don't miss this free seminar discussing the importance of having a Will, what you should and can cover in a Will and what happens in the event you lose the ability to make decisions for yourself. The sessions will be run by our Estate Planning specialist, Brian Paris. Sessions are almost full, so get in quick to avoid disappointment.

For the complete seminar flier, including registration form, please visit
http://www.wallmans.com.au/2010_wills/WillsSeminar.pdf

Dates:

25th March, 5.45pm -6.45pm (*Hurry- few places available*)

29th April 2010, 5.45-6.45pm



LG KITCHEN

Our Local Government Team love food! As it happens, every week a Team member cooks up a favourite dish and brings it in to share it with the rest of the Team. We've had delicacies from far and wide, including a mouth watering Irish rhubarb crumble and a decadent chocolate banana bread. We thought we would share some of the stand outs with you over the year. To kick off LG Kitchen, we have Natasha's Perfect Balls, just in time for Easter celebrations!

Natasha's Perfect (BAILEY) Balls



- 1pkt crushed Marie/or milk Arrowroot biscuits
- 2 tablespoons cocoa
- 2 tablespoons sunshine or similar powdered milk
- 1pkt choc chips
- 1 tin condensed milk
- 1/2 cup baileys or similar (e.g. Ballymore cream liqueur)

Mix ingredients together. The mixture is easier to roll if placed in fridge for 30 minutes to firm up.

Roll into balls, then roll in coconut or choc sprinkles. *(Depending on size can make about 60)*

Disclaimer: The contents of this newsletter is for information only and should not be regarded as formal legal advice.



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